Supreme Court, U.S.
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No. 96-47

In The

Supreme Court of the United States

October Term, 1995

ROGER D. FLEENOR,

Petitioner,

v.

HEWITT SOAP COMPANY; BILL HATMAKER; KEN WALLET; RON HILL,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

Did the United States Court of Appeals for the Sixth Circuit properly affirm the district court's dismissal of Petitioner's Title VII sexual harassment claim on the ground that Petitioner failed to allege facts sufficient to show the existence of respondeat superior liability?

LIST OF PARTIES AND RULE 29.6 STATEMENT

The parties to the proceedings in the United States Court of Appeals for the Sixth Circuit were as follows:

1. Roger D. Fleenor – Plaintiff/Appellant.
2. Hewitt Soap Company – Defendant/Appellee. Pursuant to Supreme Court Rule 29.6, the parent company of Hewitt Soap Company is American Safety Razor Company, One Razor Blade Lane, P.O. Box 500, Staunton, Virginia 24401.
3. Bill Hatmaker – Defendant/Appellee.
4. Ken Wallet – Defendant/Appellee.
5. Ron Hill – Defendant/Appellee.

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BRIEF IN OPPOSITION

Respondents Hewitt Soap Company and Ron Hill submit this Brief in Opposition to Roger Fleenor's Petition for Writ of Certiorari.

STATEMENT OF THE CASE

Petitioner Roger D. Fleenor sued Respondents Hewitt Soap Company and Bill Hatmaker, Ken Wallet, Ron Hill and Boyd Underwood,[1] who are employees of Hewitt Soap Company. Petitioner alleged in his Second Amended Complaint that Respondents perpetrated a variety of torts against him, as well as violations of Ohio Revised Code Chapter 4112 and Title VII of the Civil Rights Act of 1964.

Petitioner filed a charge of discrimination with the Ohio Civil Rights Commission ("OCRC") and Equal Employment Opportunity Commission ("EEOC") on September 17, 1992. On April 1, 1993, the OCRC reached a determination of No Probable Cause of Discrimination. The OCRC denied Petitioner's Request for Reconsideration on August 10, 1993. The EEOC issued a "Right to Sue" letter on September 30, 1993.

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[1] Petitioner voluntarily dismissed his claims against Underwood while the case was still pending in the district court. Petitioner did not name Underwood as a Defendant in his Second Amended Complaint and, for these reasons, the district court ruled that Underwood was no longer a party to this lawsuit. (Pet. App. at B-3 n.6).

Petitioner then filed a Complaint in the Court of Common Pleas, Montgomery County, Ohio on December 28, 1993. On April 7, 1994, Petitioner amended his Complaint to add a claim of hostile environment sexual harassment under Title VII. On April 29, 1994, Respondent Hewitt Soap Company removed the matter to the United States District Court, Southern District of Ohio, Western Division. Respondents then filed Motions to Dismiss all of Petitioner's claims pursuant to Federal Civil Rule 12(b)(6).

On June 28, 1994, after being served with and filing a response to Respondents' Motions to Dismiss, Petitioner sought leave to file a Second Amended Complaint. On December 21, 1994, the district court filed its Order granting Respondents' Motions to Dismiss Petitioner's federal claim of hostile environment sexual harassment under Title VII, concluding that Petitioner's same-sex sexual harassment claim, as pled, was not actionable under Title VII.[2]

On January 12, 1995, Petitioner filed a Notice of Appeal in the United States Court of Appeals for the Sixth Circuit, challenging dismissal of the Title VII claim. On April 9, 1996, the Sixth Circuit filed its Decision and Order affirming the dismissal of Petitioner's Title VII claim. The Sixth Circuit did not address the issue of whether a claim of same-sex hostile environment sexual

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[2] The district court treated Respondents' Motions to Dismiss as if they were directed at Petitioner's Second Amended Complaint. The district court remanded Petitioner's remaining state law claims to the Montgomery County Court of Common Pleas.

harassment is actionable under Title VII. Instead, the Sixth Circuit addressed *only* the issue of respondeat superior liability as a required element of Petitioner's Title VII claim. The Sixth Circuit held that, even accepting the factual allegations in the Petitioner's Second Amended Complaint as true, he failed to establish respondeat superior liability. (Pet. App. at A-5).[3]

In reviewing the allegations in Petitioner's Second Amended Complaint, the Sixth Circuit noted that the harassment was alleged to have occurred over a two-week period in August of 1992. (Pet. App. at A-2). When the Petitioner complained to the Respondent Company about the alleged harassment, the Company promptly investigated the matter and disciplined Respondent Hatmaker with a written reprimand. (Pet. App. at A-5, C-12, 13). The Sixth Circuit further noted that, by the Petitioner's own admission, the harassment ended. (Pet. App. at A-5). The Sixth Circuit concluded that since the Respondent Company took prompt and effective corrective action to end the alleged harassment, Petitioner failed to state a claim under Title VII. (Pet. App. at A-5).

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[3] Petitioner disingenuously attempts to "expand" upon the factual allegations pled in his Second Amended Complaint in his Petition. In particular, the statements attributed to both Hatmaker and Wallet alleged in the Petition (Pet. at 3-4) were not pled by Petitioner in his Second Amended Complaint. Given that this case was dismissed by the district court and affirmed by the Sixth Circuit on the basis of a Rule 12(b)(6) motion to dismiss, Petitioner's "new" allegations are inappropriate and should be ignored.

REASONS WHY THE PETITION SHOULD BE DENIED

Petitioner has presented a Petition for Certiorari that is based upon the merits of an issue not even addressed by the Sixth Circuit. Petitioner spends a large portion of his Petition addressing the issue of same-sex sexual harassment in an attempt to give the impression that the Petition somehow involves an important question of federal law. Petitioner's discussion of the same-sex sexual harassment issue is irrelevant, however, because the Sixth Circuit did not reach this issue. Instead, the Sixth Circuit disposed of the case on a totally different basis. Petitioner concedes as much when he states that the Sixth Circuit "refused to address the question of whether Title VII prohibits same-sex sexual harassment." (Pet. at 5). In sum, the Petition misses the point because it seeks review of a decision by the Sixth Circuit on an issue that was not even decided by that court.

Moreover, the issue that was decided by the Sixth Circuit does not merit this Court's review. The Sixth Circuit determined that the factual allegations contained in the Petitioner's Second Amended Complaint (the *third* Complaint filed by Petitioner) failed to establish the element of respondeat superior liability and therefore failed to state a claim for sexual harassment under Title VII. The Sixth Circuit's narrow holding does not raise an important question of federal law. Nor does it address a novel or controversial issue that warrants this Court's attention. Inasmuch as Petitioner agrees with the legal standard applied by the Sixth Circuit (Pet. at 15), he is merely seeking to have this Court review the Sixth Circuit's evaluation of the pled facts on the issue of respondeat

superior liability. This is not an area that warrants this Court's review.

The Sixth Circuit correctly applied established precedent in determining that the Petitioner's Second Amended Complaint failed to establish respondeat superior liability. The Sixth Circuit's decision turns on its own facts, as pled by the Petitioner, and will not have a substantial impact on other cases or litigants. Petitioner's spurious attempt to seek certiorari on an issue (*i.e.*, same-sex sexual harassment) not even addressed by the decision below should not be countenanced by this Court.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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August 6, 1996